

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOE CEPHUS ROSS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Does 18 U.S.C. § 2252A violate the Due Process Clause and the separation-of-powers doctrine because the statute allows a prosecutor to unilaterally select not only the statutory maximum sentence but also the statutory mandatory minimum sentence by choosing to charge either receipt or possession of child pornography when there is no difference between the two offenses, and the two offenses involve the same conduct and the same harm?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Ross, 948 F.3d 243 (5th Cir. 2020).

United States v. Ross, Case No. 4:17-CR-720-1 (S.D. Tex.).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF DIRECTLY RELATED CASES	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv
PRAYER	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT	8
REASONS FOR GRANTING THE WRIT	9
This Court should grant certiorari to decide an important question of federal constitutional and criminal law that has not been, but should be, settled by this Court – Does 18 U.S.C. § 2252A violate the Due Process Clause and the separation-of-powers doctrine because the statute allows a prosecutor to unilaterally select not only the statutory maximum sentence but also the statutory mandatory minimum sentence by choosing to charge either receipt or possession of child pornography when there is no difference between the two offenses, and they involve the same conduct and the same harm?	9
CONCLUSION	23
APPENDIX: Opinion of the Court of Appeals in <i>United States v. Ross</i> , 948 F.3d 243 (5th Cir. 2020)	24

TABLE OF CITATIONS

Page

CASES

<i>Berra v. United States</i> , 351 U.S. 131 (1956).....	21
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	19
<i>Garner v. Jones</i> , 529 U.S. 244 (2000).....	20
<i>Gonzales v. Duenas-Alvarez</i> , 549 U.S. 183 (2007).....	18
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	19
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	14
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	14
<i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338 (2016).....	20
<i>Peugh v. United States</i> , 569 U.S. 530 (2013).....	20
<i>Sansone v. United States</i> , 380 U.S. 343 (1965).....	21
<i>United States v. Abraham</i> , 944 F. Supp.2d 723 (D. Neb. 2013)	15
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979).....	14, 18-19
<i>United States v. Burrows</i> , 905 F.3d 1061 (7th Cir. 2018).....	16
<i>United States v. Davenport</i> , 519 F.3d 940 (9th Cir. 2008).....	10
<i>United States v. Dunning</i> , 857 F.3d 342 (6th Cir. 2017).....	15-16
<i>United States v. Ehle</i> , 640 F.3d 689 (6th Cir. 2011)	11
<i>United States v. Evans</i> , 333 U.S. 483 (1948)	19
<i>United States v. Hudson</i> , 11 U.S. 32 (1812).....	19
<i>United States v. Olander</i> , 572 F.3d 764 (9th Cir. 2009)	13

TABLE OF CITATIONS – (cont’d)

Page

CASES – (cont’d)

<i>United States v. Richardson</i> , 238 F.3d 837 (7th Cir. 2001)	14
<i>United States v. Robinson</i> , 669 F.3d 767 (6th Cir. 2012).....	13
<i>United States v. Ross</i> , 948 F.3d 243 (5th Cir. 2020)	<i>passim</i>
<i>United States v. Ross</i> , Case No. 4:17-CR-720-1 (S.D. Tex.)	ii
<i>United States v. Szymanski</i> , No. 88-5059, 867 F.2d 610 (Table), 1989 WL 5450 (4th Cir. Jan. 11, 1989)	11
<i>Viereck v. United States</i> , 318 U.S. 236 (1943).....	19
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	19

CONSTITUTION

U.S. Const. art. I, § 1	19
U.S. Const. art. I, § 9, cl. 3	20
U.S. Const. amend. V, cl. 4	<i>passim</i>

STATUTES

18 U.S.C. § 2252A.....	<i>passim</i>
18 U.S.C. § 2252A(a)(2)	17
18 U.S.C. § 2252A(a)(2)(B)	2-5, 13, 17
18 U.S.C. § 2252(a)(5)	17
18 U.S.C. § 2252A(a)(5)(B)	2-4, 13, 18
18 U.S.C. § 2252A(b)(1)	2-5, 13

TABLE OF CITATIONS – (cont'd)

Page

STATUTES – (cont'd)

18 U.S.C. § 2252A(b)(2)	2-5, 13
18 U.S.C. § 2551(a)	17
18 U.S.C. § 2551(c)(3)	17
18 U.S.C. § 3231	8
28 U.S.C. § 1254(1)	1
Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789, Title III, § 323(a), (b) (1990)	10
Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 § 2 (1978)	9-10
Pub. L. No. 104-208, 110 Stat. 3009-26 (1996)	10

RULES

Sup. Ct. R. 13.1	1
------------------------	---

SENTENCING GUIDELINES

USSG § 2G2.1	17
USSG § 2G2.2	<i>passim</i>
USSG § 2G2.2(a)(1)-(2)	13, 21
USSG § 3D1.2(d)	5

MISCELLANEOUS

136 Cong. Rec. S4729 (1990)	11
136 Cong. Rec. S16291 (1990)	10

TABLE OF CITATIONS – (cont’d)

Page

MISCELLANEOUS – (cont’d)

137 Cong. Rec. H6736-02 (1991)	12
Stephen L. Bacon, Note, <i>A Distinction Without A Difference: “Receipt” and “Possession” of Child Pornography and the Double Jeopardy Problem</i> , 65 U. Miami L. Rev. 1027 (2011).....	10-13
The Federalist No. 47 (J. Cooke ed. 1961)	20
Carissa Byrne Hessick, <i>Disentangling Child Pornography from Child Sex Abuse</i> , 88 Wash. U.L. Rev. 853 (2011)	13
Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020)	1
Testimony of Daniel P. Collins, Associate Deputy Attorney General, 2003 WL 1079511 (March 11, 2003).....	10
U.S. Sentencing Comm’n, <i>2012 Report to the Congress: Federal Child Pornography Offenses (2012)</i> , available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf (last accessed March 18, 2018)	12, 15
U.S. Sentencing Comm’n, <i>Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System</i> (January 2019), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf	16

PRAYER

Petitioner Joe Cephus Ross respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on January 10, 2020.

OPINIONS BELOW

On January 10, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Ross's judgment of conviction and sentence. *See United States v. Ross*, 948 F.3d 243 (5th Cir. 2020). The Fifth Circuit's opinion is reproduced as an Appendix to this petition.

JURISDICTION

On January 10, 2020, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment in this case. This petition is filed within 150 days after that date and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2252A of Title 18, United States Code, provides in pertinent part as follows:

(a) Any person who—

. . . .

(2) knowingly receives or distributes—

. . . .

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; [or]

. . . .

(5) either—

. . . .

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

. . . .

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years,

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both,

18 U.S.C. § 2252A(a)(2)(B), (a)(5)(B), (b)(1) & (b)(2).

STATEMENT OF THE CASE

On December 6, 2017, the petitioner, JOE CEPHUS ROSS, was charged by a 2-count indictment with: (1) receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1) (Count 1); and (2) possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) (Count 2). On March 22, 2018, Mr. Ross filed a motion to dismiss Count 1 of the indictment, arguing that it violated the Due Process Clause and the separation-of powers doctrine.

In essence, Mr. Ross's motion to dismiss argued:

There is no rational difference between the acts of receiving and possessing child pornography—one who receives an item necessarily possesses it—yet the statute[, 18 U.S.C. § 2252A,] and the Sentencing Guidelines[, USSG § 2G2.2,] combine to require vastly different outcomes based solely on decisions made by an individual prosecutor. That scheme grants the prosecution unconstitutional control over the ultimate sentence, violating due process and the separation of powers.

In other words, his motion argued that, because there is no difference between receipt and possession and because 18 U.S.C. § 2252A and USSG § 2G2.2 punish receipt of child pornography more harshly than possession of child pornography, “[t]his statutory scheme allows a prosecutor to bind the sentencing court’s discretion and effectively determine much of the ultimate sentence,” permitting “prosecutors to arbitrarily enforce the law.” Because this arbitrariness violates due process and because the executive branch’s ultimate control of the sentence violates the separation-of-powers doctrine, Mr. Ross’s motion requested that the court dismiss Count 1 of the indictment. His motion requested, in the alternative, that he be sentenced under the statutory range and Sentencing Guideline for

possession of child pornography.

Subsequent to the government's response, Mr. Ross's reply, and a hearing on the matter, the district court denied Mr. Ross's motion to dismiss Count 1. In denying the motion, the court made clear that it was "very troubled by this statute" and "by the entire protocol for possession and distribution of child pornography." The court thought that "there are many deficiencies in it" and "hope[d] Congress [would] take[] another look at it." In fact, the court said that it would "be pleased if the Fifth Circuit wants to reverse me."

On April 10, 2018, without a plea agreement, Mr. Ross entered a plea of guilty to both counts in the indictment. Subsequent to that proceeding, the presentence report ("PSR") calculated the total offense level to be 34 under the 2016 Sentencing Guidelines. The PSR noted that USSG § 3D1.2(d) called for the counts to be grouped together in a single group, and it used the Sentencing Guideline for the offense of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1), as charged in Count 1. Based on a total offense level of 34 and Mr. Ross's criminal history category of I, the PSR determined that the Guideline imprisonment range was 151 to 188 months. The PSR also stated that Count 1 carried a mandatory minimum prison sentence of 5 years and a maximum prison sentence of 20 years, pursuant to 18 U.S.C. § 2252A(b)(1), whereas Count 2 carried only a maximum prison sentence of 10 years, pursuant to 18 U.S.C. § 2252A(b)(2).

Expressly incorporating the arguments made in his motion to dismiss and his reply to the government's response to that motion, Mr. Ross objected to the PSR on the ground

that USSG § 2G2.2 violated the separation-of-powers doctrine and due process of law because it was unconstitutionally vague and encouraged arbitrary enforcement by prosecutors. He pointed out that, although there is no rational difference between receipt and possession, USSG § 2G2.2 set the base offense level for receipt of child pornography at 4 levels above the offense level for possession and that his Guideline imprisonment range would have been 97 to 121 months under the possession prong of the Guideline as opposed to 151 to 188 months under the receipt prong. The invitation to arbitrary enforcement by prosecutors, he argued, offended due process under the Fifth Amendment.

At sentencing on July 18, 2018, the district court overruled Mr. Ross's objection to the PSR. Following an opportunity for the government, Mr. Ross, and his counsel to speak to the appropriate sentence, the court sentenced Mr. Ross to serve a below-Guideline sentence of 110 months in prison, minus 23 months to account for time spent in state custody, for a total sentence of 87 months on each count to run concurrently. The court also imposed a 5-year term of supervised release and a \$100 special assessment on each count of conviction. The court subsequently entered an agreed order of restitution.

On July 18, 2018, Mr. Ross timely filed notice of appeal. On appeal, Mr. Ross challenged the district court's denial of his motion to dismiss Count 1 on the grounds that 18 U.S.C. § 2252A is unconstitutional under the Due Process Clause and the separation-of-powers doctrine and the court's denial of his objection on the same grounds to being sentenced for receipt, as opposed to possession, of child pornography under USSG § 2G2.2. In its opinion, the United States Court of Appeals for the Fifth Circuit rejected Mr. Ross's

constitutional challenge to the statute, finding that the offenses of receipt and possession differed and that the statute provided a prosecutor with no more than normal discretion. *United States v. Ross*, 948 F.3d 243, 246-49 (2020). The Fifth Circuit also rejected Mr. Ross's related argument that USSG § 2G2.2 is unconstitutional *Id.* at 249-50. The Fifth Circuit, therefore, affirmed the judgment of conviction and sentence. *See id.* at 250.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to decide an important question of federal constitutional and criminal law that has not been, but should be, settled by this Court – Does 18 U.S.C. § 2252A violate the Due Process Clause and the separation-of-powers doctrine because the statute allows a prosecutor to unilaterally select not only the statutory maximum sentence but also the statutory mandatory minimum sentence by choosing to charge either receipt or possession of child pornography when there is no difference between the two offenses, and they involve the same conduct and the same harm?

A. Introduction

In the lower courts, Mr. Ross argued that 18 U.S.C. § 2252A violates the Due Process Clause and the separation-of-powers doctrine because it allows a prosecutor to unilaterally select the statutory minimum and maximum sentence by choosing to charge either receipt or possession of child pornography when there is no difference between the two offenses. Both the district court and the Fifth Circuit failed to recognize the constitutional flaws in the statute and rejected Mr. Ross’s challenge. *See United States v. Ross*, 948 F.3d 243, 246-49 (2020). Because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal constitutional and criminal law that has not been, but should be, settled by this Court, this Court should grant certiorari.

B. The Legislative History of Receipt and Possession Shows the Lack of Differentiation Between Them.

Congress first criminalized child pornography in 1977.¹ At that time, only

¹ See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 § 2 (1978).

production, distribution, and receipt of child pornography were prohibited.² Possession was not a federal crime until 1990.³ Senator Strom Thurmond, who introduced the 1990 bill criminalizing possession, said the bill would “prevent the production, dissemination, and possession of child pornography.”⁴ Notably, the Senator did not list receipt of child pornography as a separate harm. Again, in a 1996 bill, Congress described the governmental interest in “prohibiting the production, distribution, possession, sale, or viewing” of child pornography, not listing receipt as a separate harm.⁵ The Department of Justice also categorized these crimes the same way, describing chapter 110 of the criminal code as prohibiting the “production, distribution, or possession of child pornography.”⁶

That logical merging of receipt and possession makes sense given how those crimes were investigated before possession was federally criminalized in 1990. Through “Operation Looking Glass,” the United States Postal Inspection Service posed as child pornography dealers and would ship illegal images to people.⁷ That type of sting operation

² *Id.*

³ Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789, Title III, § 323(a), (b) (1990).

⁴ 136 Cong. Rec. S16291 (1990) (statement of Senator Thurmond).

⁵ Pub. L. No. 104-208, 110 Stat. 3009-26 (1996); *see also United States v. Davenport*, 519 F.3d 940, 946 (9th Cir. 2008) (finding that “nowhere in its congressional findings does Congress explicitly frame receipt and possession [of child pornography] as two distinct harms.”).

⁶ *See* Testimony of Daniel P. Collins, Associate Deputy Attorney General, 2003 WL 1079511 (March 11, 2003).

⁷ Stephen L. Bacon, Note, A Distinction Without A Difference: “Receipt” and “Possession” of Child Pornography and the Double Jeopardy Problem, 65 U. MIAMI L. REV. 1027, 1033 (2011)

enabled the government to prove defendants had received child pornography. Individuals who received child pornography from private citizens, on the other hand, typically escaped prosecution because the government could not prove how or when those people received the images. Congress designed the 1990 bill to fill that gap, permitting prosecutors to charge those who possessed child pornography, whether or not the government had sent the images to them.⁸ Thus, the new federal crime of possession targeted the same harm as receipt of child pornography. Congress wanted to punish anyone who possessed illegal images.

In keeping with that view, after the criminalization of possession in 1990, the United States Sentencing Commission developed a new Guideline system that would punish possession and receipt of child pornography equally, and less severely than distribution crimes.⁹ That scheme, however, was undone by an amendment to an appropriations bill in Congress.¹⁰ It required the Sentencing Commission to punish receipt convictions under the same Guideline as distribution, rather than under the lower Guideline for possession

(citing *United States v. Szymanski*, No. 88-5059, 867 F.2d 610 (Table), 1989 WL 5450, at *1 (4th Cir. Jan. 11, 1989) (unpublished) (citation corrected)).

⁸ See 136 Cong. Rec. S4729 (1990) (statement of Senator Thurmond) (“Current law prohibits the knowing transportation, distribution, receipt or reproduction of child pornography which has traveled in interstate commerce. Those who simply possess or view this material are not covered by current law. This legislation corrects this insufficiency.”), *quoted in United States v. Ehle*, 640 F.3d 689, 698 (6th Cir. 2011).

⁹ Bacon, *supra* note 8, at 1034-35.

¹⁰ *Id.* at 1035.

offenses.¹¹ The amendment was never debated and was simply added onto a much larger bill.¹²

Before that amendment passed, however, the Chairman of the Sentencing Commission and former Chief Judge of the Fourth Circuit William W. Wilkins wrote to Congress objecting to the amendment.¹³ He wrote “[r]ecognizing that receipt is a logical predicate to possession,” he warned Congress that the proposed amendment would “reintroduce sentencing disparity among similar defendants and render the guidelines susceptible to plea bargaining manipulation.”¹⁴ His warning was prophetic.

C. Section 2252A Violates the Due Process Clause and the Separation of Powers Doctrine.

Section 2252A of Title 18 grants prosecutors broad authority to control the ultimate sentence a defendant will receive. This broad control that prosecutors wield violates the Constitution’s guarantees of due process and separation of powers.

Receipt and possession of child pornography involve the same conduct and the same

¹¹ *Id.*

¹² *Id.*; see also U.S. Sentencing Comm’n, *2012 Report to the Congress: Federal Child Pornography Offenses (2012)* (hereafter “2012 Report”) at 28, available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf (last accessed March 18, 2018) (explaining that there are no legislative findings, committee reports, or relevant floor statements to explain the different penalties for receipt and possession).

¹³ 137 Cong. Rec. H6736-02 (1991) (letter from Chairman Wilkins); see also U.S. Sentencing Commission, *2012 Report to Congress*, *supra* note 13, at 326-27 & n.77.

¹⁴ 137 Cong. Rec. H6736-02 (1991) (letter from Chairman Wilkins).

harm,¹⁵ yet receipt is punished much more harshly than possession.¹⁶ “When a prosecutor elects to charge a defendant with ‘receipt’ instead of, or in conjunction with, ‘possession,’” one scholar has explained, the prosecutor thereby “strips the judicial branch of its authority to fashion an appropriate sentence in light of the defendant’s conduct.”¹⁷ This statutory scheme allows a prosecutor to bind the sentencing court’s discretion and effectively determine much of the ultimate sentence.¹⁸ It permits prosecutors to arbitrarily enforce the law, and it gives them vast control over the ultimate sentence, in violation of the Constitution.

1. This statutory scheme violates due process.

The child pornography statute at issue here is unconstitutionally vague because it permits prosecutors to arbitrarily select the ultimate sentence a defendant will receive. A criminal statutory scheme is unconstitutionally vague, in violation of the Fifth

¹⁵ See *United States v. Robinson*, 669 F.3d 767, 776 n.2 (6th Cir. 2012) (“standing alone, the current statutory scheme makes no principled distinction between possessing and receiving child pornography”); *United States v. Olander*, 572 F.3d 764, 769 (9th Cir. 2009) (“There is little to distinguish possession from receipt. If one receives child pornography, one necessarily possesses it, at least for a short time.”); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U.L. REV. 853, 863 n.38 (2011) (explaining that possession and receipt are “essentially identical” though they have different sentencing ranges).

¹⁶ Receipt carries a statutory range of 5 to 20 years in federal prison, along with a base offense level of 22 under the Guidelines; possession carries a statutory range of 0 to 10 years in prison, along with a base offense level of 18. See 18 U.S.C. §§ 2252A(a)(2)(B), (a)(5)(B), (b)(1), (b)(2); USSG § 2G2.2(a)(1)-(2).

¹⁷ Bacon, *supra* note 8, at 1030.

¹⁸ See *id.* (“This discretion [to choose between possession and receipt charges] furnishes the prosecution with the power to determine the defendant’s ultimate sentencing fate.”).

Amendment's due process guarantee, if it fails to provide adequate notice or if it authorizes and encourages arbitrary and discriminatory enforcement.¹⁹ This Court has described this due process requirement as a way of ensuring that criminal statutes do not "permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."²⁰ The rule against vagueness applies to laws that fix sentencing ranges, not just to laws defining the elements of a crime.²¹ The sentencing provisions of 18 U.S.C. § 2252A violate due process by permitting prosecutors to arbitrarily control much of the ultimate sentence based on a nonexistent difference between receipt and possession.

Federal courts and the United States Sentencing Commission have raised this exact concern with the federal child pornography laws. The Seventh Circuit, for example, raised the question of "why receiving . . . should be punished more severely than possessing, since possessors, unless they fabricate their own pornography, are also receivers."²² That court, however, declined to rule on the issue because in that case it was not briefed by either party. The Sentencing Commission recognized the frequent criticism that "there is no rational basis to treat receipt offenses . . . and possession offenses . . . differently under the

¹⁹ See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015).

²⁰ *Kolender*, 461 U.S. at 358 (internal quotation marks, brackets, and citation omitted).

²¹ See *Johnson* 135 S. Ct. at 2556-57 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979), and invalidating, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act which increased the defendant's prison term to a minimum of 15 years and a maximum of life).

²² *United States v. Richardson*, 238 F.3d 837, 839 (7th Cir. 2001).

guidelines or penal statutes.”²³ And at least one district court has written that there is little if any rational basis for treating receipt offenders differently from possession offenders, noting that “the original rationales for treating receipt offenses more harshly no longer hold up.”²⁴

Judge Merritt of the Sixth Circuit condemned this irrational distinction between receipt and possession of child pornography, calling it a “curious mistake by Congress” that courts should not be bound to follow,²⁵ because courts have a duty to ensure that statutes are not irrational, vague, or indefinite in violation of due process.²⁶ Judge Merritt wrote that the child pornography statutes fail to recognize that possession is essentially identical to receipt, except if the defendant produced the items himself.²⁷ That irrational statutory scheme sends people to prison “for such long, ridiculous sentences,” Judge Merritt argued that the scheme must be struck down as void for vagueness.²⁸

²³ U.S. Sentencing Comm’n, *2012 Report to Congress*, *supra* note 12, at 13 (summarizing the criticism the United States Sentencing Commission received about USSG § 2G2.2 and its corresponding penal statutes).

²⁴ *United States v. Abraham*, 944 F. Supp.2d 723, 731 (D. Neb. 2013) (varying downward based on a policy disagreement with the child pornography guideline that imposes a four-level gap between receipt and possession offenders).

²⁵ *United States v. Dunning*, 857 F.3d 342, 351 (6th Cir. 2017) (Merritt, J., dissenting).

²⁶ *Id.*

²⁷ *Id.* at 352.

²⁸ *Id.* at 351-353.

Moreover, the Fifth Circuit’s reliance on cases from other circuits²⁹ for the proposition that “the offenses are different in at least one regard: a person who produces child pornography has not received it”³⁰ is misguided for two significant reasons. First, as pointed out by Sixth Circuit Judge Merritt, the argument does nothing to refute the fact that defendants who do not produce child pornography but who possess it are still subject to arbitrary enforcement of the statute and its punishment: “Non-production offenders who knowingly possess child pornography *necessarily* receive it.”³¹

While Judge Merritt relied on a 2012 report by the Sentencing Commission, *see id.*, a more recent report by the Commission continues to demonstrate the harsh and arbitrary enforcement of the law against such offenders:

5. Although Commission analysis has demonstrated that there is little meaningful distinction between the conduct involved in receipt and possession offenses, the average sentence for offenders convicted of a receipt offense, which carries a five-year mandatory minimum penalty, is substantially longer than the average sentence for offenders convicted of a possession offense, which carries no mandatory minimum penalty.

- In fiscal year 2016, the average sentence for receipt offenders (without a prior sex offense conviction) was two and a half years longer (85 months) than the average sentence length for possession offenders (without a prior sex offense conviction) (55 months).³²

²⁹ See *United States v. Dunning*, 857 F.3d 342, 349 (6th Cir. 2017), and *United States v. Burrows*, 905 F.3d 1061, 1065 (7th Cir. 2018).

³⁰ *Ross*, 948 F.3d at 247 (internal quotation marks omitted).

³¹ *Dunning*, 857 F.3d at 352 (Merritt, J., dissenting).

³² U.S. Sentencing Comm’n, Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System, at 6 (January 2019) (bold typeface omitted), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf.

In other words, the fact that producers of child pornography do not “receive” it is irrelevant to the stubborn truth that the statutory and sentencing scheme allows prosecutors to arbitrarily enforce the law against the vast number of defendants who possess child pornography.³³

Second, the theoretical point that a producer of child pornography can possess it without receiving it does not begin to demonstrate empirically that production of child pornography plays any role in the application of § 2252A(a)(2) and (a)(5), or USSG § 2G2.2. In fact, Congress has determined that production of child pornography is an offense that is more serious than receiving or possessing such materials and has enacted a separate statute to cover that crime that carries a mandatory minimum prison sentence of fifteen years and a maximum prison sentence of thirty years.³⁴ The Sentencing Commission as well has promulgated a separate Guideline with more severe punishment for production of child pornography.³⁵ Exercising “legal imagination,” therefore, to conclude that a person who produces child pornography does not receive it does not show any “realistic

³³ The contention that a prosecution that charges receipt and possession of different child pornography on different dates somehow cures the problem is mistaken. The issue raised here concerns a statutory scheme that violates the Due Process Clause and the separation of powers doctrine by allowing for arbitrary enforcement by the government, as opposed to an issue concerning a violation of the Double Jeopardy Clause.

³⁴ See 18 U.S.C. § 2551(a) & (c)(3).

³⁵ See USSG § 2G2.1.

probability” that § 2252A(a)(5)(B) is applied to such a person³⁶ or that such a theoretical point is relevant to the arbitrary enforcement and punishment that the statute does allow.

This Court has never addressed this exact issue, but it heard a similar argument in *United States v. Batchelder*. There the Court evaluated two statutes that both prohibited convicted felons from possessing firearms, but one statute set a higher maximum sentence than the other.³⁷ The Court rejected the defendant’s argument that the statutory scheme gave the prosecutor unfettered discretion to select the sentence. The Court reasoned that the government was still limited by constitutional constraints and by the fact that the statutory scheme did not allow the government to “predetermine ultimate criminal sanctions. . . . [I]t merely enables the sentencing judge to impose a longer prison sentence . . . and precludes him from imposing the greater fine.”³⁸ One crucial reason for the *Batchelder* decision, then, was that those statutes only expanded the judiciary’s discretion in imposing incarceration. The second statute only increased the statutory maximum sentence and decreased the maximum fine. Section 2252A, however, goes well beyond that.

The child pornography scheme allows a prosecutor to unilaterally select not only the maximum sentence but also the mandatory minimum sentence and the base offense level under the Sentencing Guidelines. That prosecutorial control goes far beyond what the

³⁶ *Cf. Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

³⁷ *United States v. Batchelder*, 442 U.S. 114 (1979).

³⁸ *Id.* at 125.

Court allowed in *Batchelder*. Because this statutory scheme allows prosecutors to arbitrarily select the ultimate sentence, it fails to provide due process to defendants.

2. This statutory scheme also violates the separation-of-powers doctrine.

The separation-of-powers doctrine serves as an important check on governmental power in the Constitution: “‘the Constitution sought to divide the delegation powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial.’”³⁹ “The declared purpose of separating and dividing the powers of government, of course, was to ‘diffus[e] power the better to secure liberty.’”⁴⁰

The child pornography statutory and sentencing scheme impermissibly grants prosecutors vast control over the ultimate sentence to be imposed. Congress has a constitutional responsibility to set punishments for crimes it defines;⁴¹ it may give courts wide latitude to sentence defendants, but Congress cannot give that same power to the prosecution. To do so violates the separation of powers.⁴² As James Madison wrote long

³⁹ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (brackets omitted) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

⁴⁰ *Bowsher*, 478 U.S. at 721 (brackets in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

⁴¹ See *United States v. Hudson*, 11 U.S. 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”); cf. *United States v. Evans*, 333 U.S. 483, 486 (1948) (“In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.”); U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States”).

⁴² See, e.g., *Viereck v. United States*, 318 U.S. 236, 241-47 (1943) (reversing conviction based on an indictment broader than authorized by statute or rule).

ago: “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”⁴³

But 18 U.S.C. § 2252A allows an individual prosecutor to look at a single act—receiving and thereby possessing child pornography—and to select a sentencing scheme and a Guideline level, thus significantly binding the hands of the sentencing court. That degree of prosecutorial control violates the separation of powers.

The charging decision controls the statutory maximum and minimum sentence, and it makes a 4-level difference to the defendant’s Sentencing Guideline base offense level. See USSG § 2G2.2(A)(1)-(2). That 4-level difference creates a significant risk that a defendant charged with receipt will receive a higher sentence than a defendant charged only with possession.⁴⁴ That risk flows from the role of the Sentencing Guidelines, which the Court has called the “starting point and . . . initial benchmark” for a sentencing court, which “*must* begin [its] analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”⁴⁵ The Guidelines have a “real and pervasive effect” on sentencing, which is why the Court stressed that they are “in a real sense[,] the basis for

⁴³ THE FEDERALIST No. 47 (J. Cooke ed. 1961).

⁴⁴ Cf. *Peugh v. United States*, 569 U.S. 530, 550 (2013) (citing *Garner v. Jones*, 529 U.S. 244, 251 (2000)) (finding under the *Ex Post Facto* Clause that a change to the guideline range created a “significant risk” of a higher sentence for the defendant).

⁴⁵ *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (internal quotation marks omitted).

the sentence.”⁴⁶ So the prosecutor in a child pornography case controls the statutory range as well as the “initial benchmark” and “the basis for the sentence.” That control violates the separation of powers and impermissibly grants judicial authority to the prosecution.

In *Berra v. United States*, the Court considered a statute that allowed the prosecution to charge either a felony or a misdemeanor for filing a false income tax return.⁴⁷ The majority in *Berra* did not review the constitutionality of the statute, finding that the argument had not been properly raised below.⁴⁸ In dissent, however, Justice Black, joined by Justice Douglas, wrote that the Court should have taken up the issue anyway. Justice Black wrote that the Court should construe sections of the law “so as not to place control over the liberty of citizens in the unreviewable discretion of one [prosecutor].”⁴⁹ In his words, such a system would be “wholly incompatible with our system of justice.”⁵⁰ That is precisely the flaw in 18 U.S.C. § 2252A that renders this statutory scheme unconstitutional.

Because 18 U.S.C. § 2252A grants the unfettered discretion to the prosecution to select the statutory minimum and statutory maximum sentence, as well as the Sentencing

⁴⁶ *Id.* at 1345-46.

⁴⁷ *Berra v. United States*, 351 U.S. 131 (1956) (superseded by statute on other grounds as stated in *Sansone v. United States*, 380 U.S. 343, 348-49 (1965)).

⁴⁸ *See Berra*, 351 U.S. at 137 (Black, J., dissenting).

⁴⁹ *Id.* at 138.

⁵⁰ *Id.*

Guideline base offense level, for a criminal act, it is unconstitutional. In sum, because the Fifth Circuit entered a decision on an important question of federal constitutional and criminal law that has not been, but should be, settled by this Court, this Court should grant certiorari in this case.

CONCLUSION

For the foregoing reasons, petitioner Joe Cephus Ross prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: June 4, 2020

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By 
H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

948 F.3d 243

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Joe Cephus ROSS, Defendant - Appellant

No. 18-20496

|

FILED January 10, 2020

Synopsis

Background: Following the denial of his motion to dismiss the indictment, defendant pleaded guilty in the United States District Court for the Southern District of Texas, [Keith P. Ellison, J.](#), to receipt and possession of child pornography. Defendant appealed..

Holdings: The Court of Appeals, [Barksdale](#), Senior Circuit Judge, held that:

[1] statute prohibiting receipt of child pornography, for which a defendant was subject to more severe punishment than for possession of child pornography, was not unconstitutionally vague;

[2] Sentencing Guideline providing for higher base offense level for receipt of child pornography than for possession of child pornography survived rational-basis review; and

[3] Sentencing Guideline providing for higher base offense level for receipt of child pornography than for possession of child pornography did not invite arbitrary enforcement.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (15)

- [1] **Constitutional Law** 🔑 **Obscenity and lewdness**
Obscenity 🔑 **Depiction of minors; child pornography**

The receipt and possession of child pornography did not involve logically inseparable conduct, and thus, statute prohibiting receipt of child pornography, for which a defendant was subject to more severe punishment than for possession of child pornography, was not unconstitutionally vague under Due Process Clause; the offenses were different, as a person who produced child pornography had not received it, conviction of receipt required proof of an element, namely that defendant knowingly received child pornography, that conviction of possession did not, and prosecutors routinely decided to charge defendants with certain offenses, instead of others, based on the evidence available to meet the requisite elements, and such decisions, flowing from the available evidence, were not arbitrary. [U.S. Const. Amend. 5](#); [18 U.S.C.A. §§ 2252A\(a\)\(2\)\(B\), 2252A\(a\)\(5\)\(B\), 2252A\(b\)\(1\), 2252A\(b\)\(2\)](#).

[2] **Constitutional Law** 🔑 **Vagueness**

The prohibition of vagueness in criminal statutes is an essential of Fifth Amendment due process. [U.S. Const. Amend. 5](#).

[3] **Constitutional Law** 🔑 **Vagueness**

The vagueness doctrine requires, pursuant to the Due Process Clause, that statutes define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [U.S. Const. Amend. 5](#).

[4] **Constitutional Law** 🔑 **Certainty and definiteness; vagueness**

The vagueness doctrine, under the Due Process Clause, focuses both on actual notice to citizens and arbitrary enforcement; its more important aspect is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement. [U.S. Const. Amend. 5](#).

[5] Constitutional Law 🔑 **Vagueness**

The vagueness doctrine, under the Due Process Clause, guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. [U.S. Const. Amend. 5](#).

[6] Constitutional Law 🔑 **Vagueness****Constitutional Law** 🔑 **Judgment and Sentence**

The vagueness doctrine applies, pursuant to the Due Process Clause, not only to statutes defining elements of crimes, but also to statutes fixing sentences. [U.S. Const. Amend. 5](#).

[7] Criminal Law 🔑 **Election between offenses**

When an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants.

[8] Criminal Law 🔑 **Election between offenses**

Once a prosecutor determines the evidence supports the elements of two offenses, he has discretion to charge defendant with either, or both, subject to the constraint that his choice not be the product of discriminatory animus.

[9] Constitutional Law 🔑 **Sentencing guidelines**
Sentencing and Punishment 🔑 **Validity**

Sentencing Guideline providing for higher base offense level for receipt of child pornography than for possession of child pornography survived rational-basis review under the Due Process Clause, since a rational basis for Congress' deciding to punish receipt more severely than possession could have been to deter demand for child pornography. [U.S. Const. Amend. 5](#); [18 U.S.C.A. §§ 2252A\(a\)](#)

(2)(B), [2252A\(a\)\(5\)\(B\)](#), [2252A\(b\)\(1\)](#), [2252A\(b\)\(2\)](#); [U.S.S.G. § 2G2.2\(a\)](#).

[10] Constitutional Law 🔑 **Sentencing guidelines**
Sentencing and Punishment 🔑 **Validity**

The advisory Sentencing Guidelines are not amenable to a vagueness challenge under the Due Process Clause. [U.S. Const. Amend. 5](#); [U.S.S.G. § 1B1.1 et seq.](#)

[11] Constitutional Law 🔑 **Certainty and definiteness; vagueness**

The vagueness doctrine under the Due Process Clause is a corollary of the separation of powers. [U.S. Const. art. 3, § 1 et seq.](#); [U.S. Const. Amend. 5](#).

[12] Constitutional Law 🔑 **Sentencing guidelines**

A Sentencing Guideline violates due process only if it has no rational basis or is subject to arbitrary application. [U.S. Const. Amend. 5](#); [U.S.S.G. § 1B1.1 et seq.](#)

[13] Constitutional Law 🔑 **Sentencing guidelines**

Rational-basis review is satisfied where a Sentencing Guideline challenged on due process grounds is rationally related to a conceivable, legitimate objective. [U.S. Const. Amend. 5](#); [U.S.S.G. § 1B1.1 et seq.](#)

[14] Constitutional Law 🔑 **Sentencing guidelines**
Sentencing and Punishment 🔑 **Validity**

Sentencing Guideline providing for higher base offense level for receipt of child pornography than for possession of child pornography did not invite arbitrary enforcement, as would have violated Due Process Clause; although a prosecutor's decision to charge a defendant with receipt instead of possession could be unpredictable, this was a necessary consequence

of prosecutorial discretion, and differing base offense levels did not allow prosecutors to select the ultimate sentence, which was determined by the district court. [U.S. Const. Amend. 5](#); [18 U.S.C.A. §§ 2252A\(a\)\(2\)\(B\)](#), [2252A\(a\)\(5\)\(B\)](#), [2252A\(b\)\(1\)](#), [2252A\(b\)\(2\)](#); [U.S.S.G. § 2G2.2\(a\)](#).

[15] Sentencing and Punishment 🔑 Operation and effect of guidelines in general

The court relies on the Sentencing Guidelines merely for advice in exercising its discretion to choose a sentence within the statutory limits.

[U.S.S.G. § 1B1.1 et seq.](#)

***244** Appeal from the United States District Court for the Southern District of Texas, [Keith P. Ellison](#), U.S. District Judge

Attorneys and Law Firms

[Eileen K. Wilson](#), [Carmen Castillo Mitchell](#), Assistant U.S. Attorneys, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff-Appellee.

[Marjorie A. Meyers](#), Federal Public Defender, Joshua Bradley Lake, [H. Michael Sokolow](#), Assistant Federal Public Defenders, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant.

Before [OWEN](#), Chief Judge, and [BARKSDALE](#) and [DUNCAN](#), Circuit Judges.

Opinion

[RHESA HAWKINS BARKSDALE](#), Circuit Judge:

***245** At issue are Joe Cephus Ross' constitutional challenges to the district court's denying: Ross' motion to dismiss his being charged, in count one of his two-count indictment, with receipt of child pornography, in violation of [18 U.S.C. § 2252A\(a\)\(2\)\(B\)](#) (count two charged possession of child pornography on a separate, subsequent date, in violation of [18 U.S.C. § 2252A\(a\)\(5\)\(B\)](#)); and his

similar objection to being sentenced, pursuant to Sentencing Guideline § 2G2.2, for receipt, as opposed to possession, of child pornography (higher base offense level for the former). AFFIRMED.

I.

In March 2016, an undercover Homeland Security special agent identified an internet-protocol (IP) address was sharing, via a peer-to-peer-internet network, computer files with hash values (alphanumeric string of characters that identifies computer file's contents, *see* [United States v. Reddick](#), 900 F.3d 636, 637 (5th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 1617, 203 L.Ed.2d 902 (2019)) known to belong to child-pornography videos and images. Further investigation revealed the IP address: was associated with the residence of Ross and his mother; and, from February to July 2016, shared child-pornography files with other internet users.

That August, members of a Houston, Texas, police taskforce executed a search warrant at the residence, seizing several computers and other devices. A subsequent forensic examination revealed these contained more than 17,000 images and 500 videos depicting child pornography, including victims appearing to be as young as four, as well as file-sharing programs. Ross admitted he collected child-pornography images and videos; explained how the file-sharing programs worked; and acknowledged he used them to distribute child pornography.

In a two-count indictment, Ross was charged, in count one, with receipt of child pornography, in violation of [18 U.S.C. § 2252A\(a\)\(2\)\(B\)](#) and based on his operating the peer-to-peer-file-sharing program between February and July 2016; and, in count two, with possession of child pornography, in violation of [18 U.S.C. § 2252A\(a\)\(5\)\(B\)](#) and pertaining to the images and videos discovered on the devices seized during the August 2016 search. Ross moved to dismiss the receipt count, claiming: because there is no meaningful distinction between a person's receiving child pornography and possessing it, [§ 2252A](#) was unconstitutionally vague, in violation of the Fifth Amendment's Due-Process Clause, in allowing arbitrary prosecutorial charging decisions.

The motion was denied from the bench at the conclusion of an April 2018 hearing. Although the district judge doubted the constitutionality of the receipt statute, he reasoned the

controlling law was “decidedly *246 the contrary” to Ross’ claim. Later that month, Ross pleaded guilty, unconditionally and without a plea agreement, to both charges.

For sentencing, and incorporating the same constitutional grounds as in his motion to dismiss, Ross objected to the presentence investigation report’s (PSR) calculating his advisory Guidelines sentencing range pursuant to the above-described Guideline § 2G2.2. The objection was denied.

Regarding the PSR’s recommending an advisory Guidelines sentencing range of 151–188 months’ imprisonment, the court varied downward, however, sentencing Ross to, *inter alia*, 110 months’ imprisonment on each count, concurrently, and deducting a further 23 months for time held in state custody. The sentence was to run concurrently with any imposed in a pending state criminal case charging Ross with possession of child pornography.

II.

Except for the stated constitutional challenges, Ross does not challenge either his guilty-plea convictions or the sentence imposed, including not claiming a double-jeopardy violation. Ross preserved in district court his constitutional challenges (to the child-pornography statute, 18 U.S.C. § 2252A, and Guideline § 2G2.2); accordingly, our review is *de novo*. *E.g.*, [United States v. Jones](#), 854 F.3d 737, 738 (5th Cir. 2017) (citation omitted) (constitutional challenge to statute as vague); [United States v. Preciado-Delacruz](#), 801 F.3d 508, 511 (5th Cir. 2015) (citations omitted) (constitutional challenge to Guidelines’ application). (Ross’ unconditional guilty plea does not waive his being able on appeal to assert these constitutional challenges. *E.g.*, [Class v. United States](#), — U.S. —, 138 S. Ct. 798, 803, 200 L.Ed.2d 37 (2018).)

A.

Regarding the challenged statute, it is a federal crime to “knowingly receive[] or distribute[]” material containing child pornography. 18 U.S.C. § 2252A(a)(2)(B). This offense carries, as relevant in this instance, a term of imprisonment between five and 20 years. *Id.* § 2252A(b)

(1). It is also a federal crime to “knowingly possess[]” child pornography. *Id.* § 2252A(a)(5)(B). This offense carries, by contrast and as relevant in this instance, a maximum sentence of ten years. *Id.* § 2252A(b)(2). (Possession carries stiffer sentences in certain circumstances, *see id.*, but these were not charged in this instance.)

[1] Ross does not contend § 2252A fails to provide fair notice of the proscribed conduct. He instead claims § 2252A is unconstitutionally vague, in violation of the Fifth Amendment’s Due-Process Clause, because: possession and receipt of child pornography are logically inseparable; both § 2252A’s legislative history and Sentencing Commission materials recognize their inseparability; prosecutors may arbitrarily decide to charge defendants, for indistinguishable conduct, under the more-severely-punished receipt offense instead of the less-severely-punished possession offense; and such prosecutorial control over the ultimate sentence violates the separation of powers. Each claim fails.

[2] [3] [4] [5] [6] “The prohibition of vagueness in criminal statutes ... is an essential of [Fifth Amendment] due process ...”. [Sessions v. Dimaya](#), — U.S. —, 138 S. Ct. 1204, 1212, 200 L.Ed.2d 549 (2018) (internal quotation marks and citation omitted). Along that line, the vagueness doctrine requires statutes “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited [—as noted, Ross does not challenge the statute in this regard—] and *247 in a manner that does not encourage arbitrary and discriminatory enforcement”. [Kolender v. Lawson](#), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (citations omitted). “[T]he doctrine focuses both on actual notice to citizens and arbitrary enforcement”; its “more important aspect ... is not actual notice”, however, but “the requirement that a legislature establish minimal guidelines to govern law enforcement”. *Id.* at 357–58, 103 S.Ct. 1855 (internal quotation marks and citation omitted). It “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges”. [Dimaya](#), 138 S. Ct. at 1212 (citing [Kolender](#), 461 U.S. at 357–58, 103 S.Ct. 1855). And, it applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences”. [Johnson v. United States](#), — U.S. —, 135 S. Ct.

2551, 2557, 192 L.Ed.2d 569 (2015) (citation omitted). (Ross’ asserted separation-of-powers violation is not separate from his vagueness challenge because the vagueness doctrine “is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not”.  *Dimaya*, 138 S. Ct. at 1212 (citation omitted).)

Ross’ claim that possession and receipt are logically inseparable conduct, and that, as a result,  § 2252A’s criminalizing both invites unconstitutionally arbitrary enforcement, is incorrect. As the other circuits to consider the issue have concluded, the offenses are different in at least one regard: “a person who produces child pornography has not received it”. *United States v. Dunning*, 857 F.3d 342, 349 (6th Cir. 2017); accord  *United States v. Burrows*, 905 F.3d 1061, 1065 (7th Cir. 2018).

Conviction of receipt, moreover, requires proof of an element—defendant *knowingly* received child pornography—that conviction of possession does not. See  18 U.S.C. § 2252A(a). This distinction reveals another way in which the offenses differ. As Ross conceded at oral argument in our court: a person could receive computer files without contemporaneously knowing they contained child pornography; and, if that person subsequently discovered they contained such material, he would knowingly possess child pornography, without having knowingly received it. (In the light of these distinctions, to the extent Ross contends  § 2252A violates the Fifth Amendment’s Due-Process Clause because of a claimed lack of a rational basis for its distinguishing between possession and receipt offenses, that contention also fails. See *United States v. Olander*, 572 F.3d 764, 769–70 (9th Cir. 2009) (discussing how Congress could have decided to proscribe and punish receipt separately from possession in order “to deter those who receive child pornography from others and who thereby create demand and drive the market for child pornography”).)

Along those lines, it goes without saying that prosecutors routinely decide to charge defendants with certain offenses, instead of others, based on the evidence available to meet the requisite elements. This is particularly relevant for receipt of child pornography. It can be difficult to prove the requisite knowing-receipt because this requires intricate—and sometimes impossible—tracing and analysis of computer files unless, as in this instance, the Government happened to

be operating undercover on the same peer-to-peer, internet-file-sharing network as defendant. Such decisions, flowing from the available evidence, are anything but arbitrary.

[7] Ross contends this is not the factual scenario in this instance because his conduct underlying the receipt count constituted both receipt and possession. “[B]ut *248 [such overlap] is unremarkable and has no bearing on whether the statute is unconstitutionally vague”.  *United States v. Watzman*, 486 F.3d 1004, 1010 (7th Cir. 2007) (citation omitted). “[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants”.  *United States v. Batchelder*, 442 U.S. 114, 123–24 & 125 n.9, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (citations omitted) (noting prosecutor’s decision to charge more serious offense violates equal protection if motivated by, e.g., racial discrimination).

Ross attempts to distinguish  *Batchelder*, but its reasoning further demonstrates why the receipt statute is not unconstitutionally vague.  *Batchelder* concerned two statutes,  18 U.S.C. §§ 922(h) and 1202(a), both criminalizing convicted felons’ receiving firearms; and the statutes’ “substantive elements” were “identical” as applied to defendant.  *Id.* at 116–17, 99 S.Ct. 2198. A conviction under  § 922(h) was punished according to § 924(a), providing a maximum \$5,000 fine and/or a maximum five years’ imprisonment.  *Id.* at 116 nn.2–3, 99 S.Ct. 2198. Section 1202(a), by contrast, provided a maximum \$10,000 fine and/or a maximum two years’ imprisonment.  *Id.* at 117 n.4, 99 S.Ct. 2198. Conviction and sentencing under  § 922(h), providing the longer term of imprisonment, was challenged as unconstitutionally vague. See  *id.* at 122–23, 99 S.Ct. 2198.

The Supreme Court held conviction and sentencing under  § 922(h) constitutional.  *Id.* at 123, 99 S.Ct. 2198. “[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements”.  *Id.* at 125, 99 S.Ct. 2198. “[O]nce [the prosecutor] determines that the proof will support conviction

under either statute”, prosecutorial discretion permits his choosing either. See [id.](#)

[Batchelder](#) did not rest, as Ross claims, on the statutes’ somehow expanding judicial-sentencing discretion. Nor, as he also contends, did it concern only the vagueness doctrine’s fair-notice component. Compare [id.](#) at 124–25, 99 S.Ct. 2198 (dismissing claim statutes allowed “unfettered” discretion), with [Johnson](#), 135 S. Ct. at 2556 (recognizing as unconstitutionally vague statute “so standardless that it invites arbitrary enforcement”).

[Batchelder](#) also rejected the claim “the statutes might impermissibly delegate to the Executive Branch the Legislature’s responsibility to fix criminal penalties”.

[Batchelder](#), 442 U.S. at 125–26, 99 S.Ct. 2198 (citations omitted). The statutes “plainly demarcate[d] the range of penalties that prosecutors and judges m[ight] seek and impose”, [id.](#) at 126, 99 S.Ct. 2198, as does [§ 2252A](#).

[Batchelder](#) further rejected a prior dissenting opinion Ross cites approvingly in describing his vagueness claim. See [id.](#) at 124, 99 S.Ct. 2198 (citing [Berra v. United States](#), 351 U.S. 131, 139–40, 76 S.Ct. 685, 100 L.Ed. 1013 (1956) (Black, J., dissenting)).

[8] As stated, and unlike the statutes at issue in [Batchelder](#), the receipt and possession offenses in [§ 2252A](#) have different elements. There is no “appreciable difference between the discretion a prosecutor exercises” in choosing whether to charge defendant with receipt, possession, or both, and the decision to charge defendant with, e.g., one of many possible homicide offenses. See [id.](#) at 125, 99 S.Ct. 2198. Once a prosecutor determines the evidence supports both offenses’ elements, he has discretion to charge defendant with either (or both), subject to the constraint that his choice not be the product of discriminatory

*249 animus. [Id.](#) at 125 n.9, 99 S.Ct. 2198. (Other circuits have held convictions for both based on the same underlying conduct violates the Fifth Amendment’s Double-Jeopardy Clause. See, e.g., [United States v. Ehle](#), 640 F.3d 689, 698 (6th Cir. 2011); [United States v. Miller](#), 527 F.3d 54, 72 (3d Cir. 2008); [United States v. Davenport](#), 519 F.3d 940,

947 (9th Cir. 2008). As stated, this issue is not raised in this appeal.)

Regarding Ross’ claim that any distinction between receipt and possession is theoretical and does not empirically demonstrate that production of child pornography plays any role in the application of [§ 2252A\(a\)\(2\)](#) and [\(a\)\(5\)](#), such an analysis implicates whether a provision is narrowly tailored, not whether it is unconstitutionally vague. See, e.g., [Fisher v. Univ. of Tex. at Austin](#), 758 F.3d 633, 643–44 (5th Cir. 2014) (citation omitted) (requiring governmental entity to prove program narrowly tailored to goal). Nor has Ross asserted the Government unconstitutionally discriminated against him, see [Batchelder](#), 442 U.S. at 125 n.9, 99 S.Ct. 2198, which statistical analyses of charging decisions could demonstrate. And, needless to say, to the extent Ross submits it would be better policy to equalize punishment between receipt and possession of child pornography, the Constitution entrusts that determination to Congress, not the courts.

B.

[9] In the alternative, Ross challenges as unconstitutional Guideline § 2G2.2’s providing different base offense levels for receipt and possession, contending the Guideline: violates the separation-of-powers doctrine; and invites arbitrary enforcement and application, in violation of the Fifth Amendment’s Due-Process Clause. As discussed *supra*, this preserved challenge to the Guideline is reviewed *de novo*.

Pursuant to Guideline § 2G2.2, conviction of possession corresponds to a base offense level of 18, while conviction of receipt carries a level of 22. See [U.S.S.G. § 2G2.2\(a\)](#). As do the parties, we recognize that, because Ross’ challenge to the Guideline relies on the claimed lack of rational difference between the receipt and possession offenses, it substantially overlaps with his challenge to [§ 2252A](#). To the extent it is a separate claim, it also is unavailing.

[10] [11] Moreover, as Ross concedes, the advisory Guidelines are not amenable to a vagueness challenge.

[Beckles v. United States](#), — U.S. —, 137 S. Ct. 886, 894, 197 L.Ed.2d 145 (2017). And, as discussed *supra*, because the vagueness doctrine is a “corollary of the separation of powers”, [Dimaya](#), 138 S. Ct. at 1212, Ross’

claim Guideline § 2G2.2 violates the separation of powers is similarly foreclosed.

[12] [13] Concerning Ross’ Fifth Amendment due-process challenge on grounds other than his foreclosed vagueness claim, “[a] guideline violates due process only if it has no rational basis or is subject to arbitrary application”. *United States v. Bacon*, 646 F.3d 218, 221–22 (5th Cir. 2011) (citations omitted). Such rational-basis review is satisfied where the challenged Guideline is rationally related to a conceivable, legitimate objective. *See United States v. Galloway*, 951 F.2d 64, 65–66 (5th Cir. 1992) (citations omitted) (applying rational-basis review to due-process and equal-protection challenges to Guidelines). As stated, a rational basis for Congress’ deciding to punish receipt more severely than possession could have been to deter demand for child pornography. *See Olander*, 572 F.3d at 769–70.

[14] That a prosecutor may choose to charge a defendant with receipt instead of possession may be unpredictable, as Ross contends; this, however, is a necessary *250 consequence of prosecutorial discretion. Such decisions affect the base offense level assessed defendants, of course; but, this alone does not cause a constitutional violation. *See Batchelder*, 442 U.S. at 125, 99 S.Ct. 2198 (citations omitted) (“The prosecutor may be influenced [in his charging decision] by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the ... Due Process Clause.”).

[15] Nor do the differing base offense levels allow, as Ross claims, prosecutorial selection of the ultimate sentence.

Pursuant to *United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which rendered the Guidelines advisory, the district court determines that sentence. *E.g.*, *Beckles*, 137 S. Ct. at 894. “The court relie[s] on the [Guidelines] merely for advice in exercising its discretion to choose a sentence within [the] statutory limits.” *Id.* at 895.

The court’s downward variance in this instance demonstrates the distinction between the advisory Guidelines sentencing range and the sentence imposed. The Guidelines sentencing range Ross complains was arbitrarily assigned him (because he was charged with receipt in count one) did not bind the court, which exercised its discretion to vary from the Guidelines and impose a significantly lower sentence. This advisory character is precisely why the Guidelines “are not amenable to a vagueness challenge”. *See id.* at 894.

III.

For the foregoing reasons, the judgment is AFFIRMED.

All Citations

948 F.3d 243